THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

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Office of the President July 11, 2012

Statement of J. Jeremiah Mahoney submitted to the House Ways and Means Subcommittee on Social Security (Fourth Hearing in a Series on Securing the Future of the Social Security Disability Insurance Program):

May it please the Committee; I have served as a federal Administrative Law Judge ("ALJ") for 4 years, and am currently employed as the Acting Chief ALJ for the U.S. Department of Housing and Urban Development. In 2000, I retired from the U.S. Air Force as the longest-serving Military Judge in U.S. history.

My comments today are my own, in my role as President of the Federal Administrative Law Judges Conference, which is a professional organization composed of over 260 federal ALJs appointed under 5 U.S.C. § 3105. ALJs conduct formal, "on-the-record" administrative hearings, which are governed by the Administrative Procedure Act of 1946 ("APA"). Congress passed the APA to ensure the integrity of the administrative adjudication process, and FALJC seeks to preserve those APA guarantees.

One of the issues raised at the Committees' hearing on June 27, 2012, centered on the question of whether ALJs are required by law to decide Social Security Administration ("SSA") disability appeals. Judge Randy Frye indicated he would address that issue in written comments.

However, whether or not ALJs are required by law to adjudicate SSA disability appeals, as a matter of legislative policy the committee should carefully consider whether disability appeals should be decided by ordinary agency employees—or by judges whose independence is guaranteed by statute. As is well known, ordinary agency employees are subject to incentives and sanctions that may bear upon the speed and outcome of their decision on each appeal. ALJs, on the other hand, are free of such extraneous agency influence in arriving at the correct decision based upon a complete record.

The APA requires that on-the-record agency proceedings be presided over by the head of the agency, a member of the body (*e.g.*, a commission) heading the agency, or ALJs. "Congress contemplated that "agency heads, unable personally to conduct hearings, would be forced to delegate that duty", permitted such delegation only to ALJs, and enacted provisions assuring that such ALJs would be "qualified" and "impartial".

The APA and its implementing regulations subject all ALJ applicants to the rigors of the competitive civil service, and thereby remove any hint of cronyism or agency politics from the

ALJ appointment process. The Office of Personnel Management ("OPM") exercises exclusive government-wide authority to evaluate and qualify ALJ candidates through the maintenance of a certified register, which ranks the candidates based on their ability to meet rigorous, objective, merit-based criteria. These criteria include a review of the candidate's career accomplishments, performance on a lengthy written examination and performance in a structured interview before a panel of three professionals. Under the "Rule of Three," OPM must refer only the three highest-ranking ALJ candidates to each agency seeking to hire from the certified register. In addition, OPM must approve all transfers of ALJs between agencies. These rules assure that agencies will hire only the most qualified applicants.

Equally critical, the APA and its implementing regulations prevent agencies from influencing ALJs' decisions by shielding ALJs from the scheme of rewards and punishments to which other federal employees are subject. The APA precludes federal agencies from subjecting ALJs to performance standards for federal agency employees, and from granting ALJs monetary awards or incentives (*e.g.*, bonuses). Unlike other competitive-service federal employees, ALJs are subject to removal, suspension, reduction in grade or pay, or a furlough under 31 days, "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." In addition, agencies must assign cases to each ALJ on a rotational basis to the maximum extent practical.

The Committee has heard comments from academic witnesses who suggest that claimant's appeals can be adequately handled by ordinary agency employees. As one consequence dissatisfied claimants—seeking an independent decision maker—would have recourse only to the Article III courts. There are respected academics who oppose that suggestion, and believe that ALJ decision-makers are an essential part of the process. Such opposing views should be carefully considered by the Committee. As an example please see, *Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them)*, by Professors Jon C. Dubin and Robert E. Rains. http://www.acslaw.org/publications/issue-briefs/scapegoating-social-security-disability-claimants-and-the-judges-who-evalu Additionally, two Social Security ALJs have responded to a critical article by Professor Richard Pierce, who appeared before the Committee. ALJ Jeffrey S. Wolfe and ALJ Dale D. Glendening, *What We Should Do About Social Security Disability*, REGULATION, Spring 2012, at 16.

Many of the members of the Federal Administrative Law Judges Conference have previously served as Social Security ALJs, and many other members are still employed as ALJs by SSA. We believe that ALJ decisions on disability appeals are an important part of the SSA Disability Insurance process because the ALJ exercises decisional independence from the agency. That fact enhances the perception of fairness that is essential to the credibility of the administrative process at SSA, and the acceptance of decisions by your constituents.

There were several matters raised and discussed at the hearing—aside from expensive resources—that may help alleviate the current disability appeal adjudication problems and case backlog. Closing the record at a specific point in the process; providing incentive for

representation at the early stages of a claim; providing disincentives in seeking delays; preventing judge shopping; and modifying the manner of computation and amount of representational fees may help. However, it is our opinion that changing the character of the decision-maker on SSA Disability Appeals will do far more harm than good.